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IN THE

Supreme Court of the United States

October Term, 1968

No. 14

COMMONWEALTH COATINGS CORPORATION,
Petitioner,

-v-

CONTINENTAL CASUALTY COMPANY,
FIREMAN'S FUND INSURANCE COMPANY
AND A. C. SAMFORD OVERSEAS, INC.,
Respondents.

PETITION FOR REHEARING

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On the Brief

PERSPECTIVE

"A hen is only an egg's way of making another egg."

Samuel Butler
Life and Habit, Ch. 8

ETHICS AND THE DUTY TO INQUIRE

"Ask, and it shall be given: seek, and ye shall find: knock, and it shall be opened unto you: for everyone that asketh receiveth: and he that seeketh findeth and to him that knocketh it shall be opened."

Matthew 7: 7-8

RECONSIDERATION

"Only the hand that erases can write the true thing."

Meister Eckhart

"I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday."

Jackson J., *Massachusetts v. United States* (1948), 333 U.S. 611, 639, 92 L. Ed. 968, 986, 68 S. Ct. 747

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On the Brief

MOTION FOR REHEARING

Respondents pray that this Court grant rehearing of its decision of November 18, 1968, vacating the arbitration award, 21 L.Ed.2d 301 (1968), and that this case be remanded for further proceedings in the Federal District Court, or reversed, for the reasons stated herein:

SUMMARY OF REASONS FOR THE GRANTING OF A REHEARING AND REMAND OR REVERSAL OF THE CASE

(1) There is not a scintilla of evidence to support the fundamental basis of the Court's decision, namely, that ". . . the facts concerning the close business connections between the third arbitrator and the prime contractor were unknown to Petitioner. . . ." No proof was submitted by Petitioner at the trial that it did not know of the relationship, and that it relied on this assumption. In fact, the issue of partiality was never tried by the District Court, the Court having ruled there was no "evident partiality" by reason of the admissions of Petitioner. Since this Court has held, in effect, that the trial court erred in following that standard, Respondents are now entitled to a trial under the "appearances" test as adopted by this Court; to rule otherwise would deny Respondents' right to trial. On a new trial Respondents will prove that Petitioner had knowledge of the allegedly disqualifying relationship.

(2) This Court erred in failing to adequately consider the admission of Petitioner that Mr. Capacete was innocent of any actual partiality, bias or improper motive; this admission totally negates any possible appearance of wrongdoing. The Court noted only that Petitioner did not charge Mr. Capacete with fraud or bias, but

Petitioner actually did far more, it admitted there was no actual partiality, bias or improper motive *as a matter of fact*, and even agreed to resubmit the case to the same Board of Arbitrators. Such admission of the qualifications of Mr. Capacete entirely dispels any "appearance," "suspicion" or "impression" of possible wrongdoing. Surely the reality of the case shall control appearances.

(3) The decision of this Court holds an arbitrator to the same standards that govern disqualification of a judge or juror. It is earnestly submitted that were Mr. Capacete a judge or juror in the subject arbitration he would not have been disqualified, because his interest in the subject matter of the proceeding was not present, direct, pecuniary or proprietary, and substantial in view of all the facts and circumstances. The Court in applying these standards to the facts on the record committed fundamental factual error. Respondents, moreover, have been deprived of their right to trial on the question of whether Mr. Capacete would be disqualified were he serving as a judge or a juror in the dispute arbitrated.

(4) The decision of this Court is contrary to judicial precedent, the facts of this case and Congressional intent as to the duty of arbitrators to volunteer information and creates thereby a truly burdensome and unrealistic duty for the untold numbers of arbitrators commissioned to resolve disputes in private informal proceedings.

REMEDY REQUESTED

For all of the reasons summarized above and developed hereinafter, Respondents respectfully request that this motion for rehearing be granted.

Respondents earnestly submit that the case should be remanded for trial, because:

(1) There was no trial in the District Court on the issue of "evident partiality," the only issue tried being whether certain exhibits were properly admitted by the Board of Arbitrators, and Respondents will prove in a trial that Petitioner had knowledge of the allegedly disqualifying relationship; and

(2) Trial was not had in the District Court on the issue of whether Mr. Capacete would be disqualified as a judge or juror in the dispute, and Respondents will prove that Mr. Capacete would not have been disqualified as a judge or juror.

Respondents submit, in the alternative, that this Court's decision should be reversed, because:

(1) Petitioner failed to carry its burden of proof to show lack of knowledge of the previous business relationship of which it complains, and to show reliance of Petitioner on the assumption that there was no previous relationship;

(2) The Court erred in not adequately considering the admission of Petitioner that Mr. Capacete was innocent of any actual partiality, bias, or improper motive, which admission causes Mr. Capacete to qualify as an arbitrator under the "appearances" test adopted by this Court;

(3) The Court should find as a matter of law that, had Mr. Capacete been a judge or juror, the previous business relations would not have disqualified him from serving in the dispute under the standards applicable to judges or jurors; and

(4) As a matter of law, this decision is contrary to judicial precedent, the facts of this case and Congressional intent.

AFFIDAVITS SUBMITTED IN SUPPORT OF MOTION FOR REHEARING

In support of the foregoing Petition and Prayer, Respondents respectfully request the Court to consider the following justifications based upon the record, cited legal authorities and affidavit of Respondents' representatives, Mr. A. C. Samford, Jr. and Mr. Roger Dickinson, and the affidavit of Respondents' counsel. These affidavits, printed in the appendix hereto (see p.46, *infra*) with their originals being filed with the Clerk of this Court, respectfully give evidence that:

(1) The relationship and ownership of the Respondent corporation had totally changed before the arbitration; the Vice-President and Executive Officer who had engaged Mr. Capacete's firm had terminated employment with Respondent more than a year before the arbitration. These changes in ownership and officers were publicly announced and known actually or constructively to both Mr. Capacete and Petitioner. Respondent had commenced using the testing and consulting services of another engineering firm in competition with Mr. Capacete's firm. Mr. Capacete was not a close social or business associate of Respondent Samford or its officers, agents, or attorneys. The relationship when fully and completely understood explains the innocence and uncalculated nature of the nondisclosure by Mr. Capacete of a previous business relationship, which he had every reasonable right to assume the Petitioner knew of or waived objection to, since Mr.

Capacete's and Respondent's business dealing had been in public view on job sites where Petitioner's forces were present, during working hours, with no effort to hide or conceal their work or their past relationship.

(2) Petitioner and its attorneys never inquired of Respondents or their agents or representatives and attorneys about Mr. Capacete's or any of the other arbitrators' qualifications and past relationships although they were in frequent contact with various representatives of Respondent Samford and its attorneys in Puerto Rico. There was constant opportunity to make such inquiry, but Petitioner made no such inquiry in letters, in interrogatories, in pretrial hearings or in any other contacts prior to or during the arbitration proceedings; attorneys for Petitioner and Respondents were always present during conferences; and Respondents and their attorneys had every reasonable right to assume that Petitioner knew all that it desired to know regarding the qualifications of the arbitrators and therefore there was no calculated or conscious effort to prevent disclosure of past relationships, but Respondents and their representatives dealt in good faith with Petitioner, who was active as an adversary with no fiduciary relationship or any form of dependency upon Respondents existing.

(3) Petitioner had breached many promises, commenced litigation, engaged New York and San Juan attorneys, threatened the Respondents and attempted to intimidate Respondents by reporting that Petitioner had engaged the nation's most outstanding attorney in this legal field. Respondents' attorney did not know of previous relationships about which Petitioner complains or that Petitioner did not know of them. Respon-

dents' attorneys did know that Mr. Capacete had previously jointly served the Respondent and the Puerto Rican Health Authority in adjusting, deciding and recommending the settlement of a dispute between them on a laundry job, on which Petitioner was a subcontractor, and it was assumed and believed that representatives of Petitioner had knowledge of at least this past relation because of the wide notoriety of the construction dispute and contest between Respondent Samford and the Medical Authority's Chief Resident Engineer. The enormity of this dispute is revealed by the fact that the Chief Resident Engineer had been so difficult for prime and subcontractors to deal with Respondent Samford made the rare request of the Authority that he be replaced. Respondents' attorneys continually and widely discussed this matter with subcontractors and others. It is believed that it could be established that Petitioner and its representatives knew of this dispute and Mr. Capacete's employment by Respondent Samford there.

ARGUMENT

I. THERE IS NO EVIDENCE WHATSOEVER TO SUPPORT THE FUNDAMENTAL BASIS OF THE COURT'S DECISION, NAMELY, THAT ". . . THE FACTS CONCERNING THE CLOSE BUSINESS CONNECTIONS BETWEEN THE THIRD ARBITRATOR AND THE PRIME CONTRACTOR WERE UNKNOWN TO PETITIONER. . . ."

The Court predicates its opinion on the critical assumption of fact that Petitioner *did not know* that the engineering consulting firm with which the third arbitrator, Mr. Capacete, was associated had performed

certain services for Respondent, A. C. Samford Overseas, Inc. The Court's statement is:

> ". . . An arbitration was held *but the facts concerning the close business connections between the third arbitrator and the prime contractor were unknown to petitioner* and were never revealed to it by this arbitrator, or by the prime contractor, or by anyone else until after an award had been made." (Emphasis added.)

There is a total absence of any evidence in the case to support this essential premise to the Court's opinion that Petitioner did not know of the past business relations.

A. MR. ROMERO'S AFFIDAVIT IS NOT PROOF IN THIS ACTION AND IS NOT RELEVANT TO THE ISSUE OF KNOWLEDGE OR THE RELIANCE OF PETITIONER.

Petitioner has attempted to argue as "proof," and as its *only* "proof," concerning lack of knowledge of the relationship that the affidavit of its attorney, Mr. Carlos Romero Barcelo, (A.54) supports its allegation of fraud or partiality. A. 69; Reply Br. of Pet., p. 4. However, the allegations of partiality and fraud and any effect of Mr. Romero's affidavit on the award were categorically denied by Respondents in their answer which was sworn to (A. 65, 68-69, 73), and in all subsequent proceedings (*e.g.* A. 78-82).

Of conclusive importance is the fact the affidavit of Mr. Romero has never become proof or evidence in this action. The affidavit itself was never introduced into evidence (A. 86-183) and no testimony was taken concerning most of the statements contained in the affidavit although Mr. Romero himself testified at the trial (A. 148-154).

Secondly and of equal significance is the total absence in the affidavit of any statement that *Petitioner* did not know of this relationship and that Petitioner *relied* on this assumption. A. 54. Mr. Romero did perhaps imply in his affidavit that he *personally*, without mentioning Petitioner, did not know of the relationship, but Mr. Romero's affidavit does not state that *Petitioner* did not know of the relationship. Thus, the affidavit cannot be said to support the premise that Petitioner had no knowledge, and the affidavit is of no relevance whatsoever on this issue. See Br. of Resp., p. 51-56.

B. NO PROOF WAS SUBMITTED IN THE TRIAL OF THE CASE BY PETITIONER THAT PETITIONER DID NOT KNOW OF THE PAST RELATIONSHIP OR THAT PETITIONER RELIED ON THIS ASSUMPTION, AND THESE ISSUES WERE NEVER TRIED.

In the hearings in the District Court and the trial of the case by the District Court, not an iota of proof was submitted by Petitioner to show that Petitioner did not know of the past relationship between Mr. Capacete's firm and Respondent Samford or that Petitioner relied on this assumption. Petitioner had alleged that the award was void on five independent grounds:

(1) By reason of the rendition of the award allegedly in violation of a general restraining order issued in bankruptcy proceedings involving Respondent Samford;

(2) By reason of the alleged "evident partiality" of Mr. Capacete;

(3) Because arbitration hearings were held on Sundays and Labor Day;

(4) By reason of the award's having been entered more than thirty days following the close of the oral hearings; and

(5) Because certain exhibits of Respondent Samford were admitted into evidence by the Board allegedly over the objection of Petitioner and Petitioner was allegedly denied an adequate opportunity to examine these documents and cross-examine Respondent Samford's witnesses. A. 87-91.

All of these issues with the exception of the last, the issue of admission of certain exhibits, were resolved by the District Court *prior to* the actual taking of testimony in the case in pretrial proceedings. On numerous instances during the actual trial, the District Court continually reiterated that the *sole issue* being tried was the issue of admission of certain exhibits of Respondent Samford, allegedly after objection and without opportunity for cross-examination. See p. 13, *infra*. At the commencement of the trial when the Court limited the issue to be tried to that issue Petitioner made no objection to trial on that issue alone. A. 99.

Petitioner apparently believed that it was not necessary for it to furnish proof on the remaining issues. Respondents in their pleadings and in open court had denied the various allegations by Petitioner of fraud, "evident partiality," etc., made by Petitioner (A. 65, 68-69, 78-82); Respondents had admitted the occurrence of certain past business transactions as set forth in the answer of Respondents (A. 65), and alleged that Petitioner "knew or should have known of the previous professional services. . . ." A. 66. Apparently Petitioner initially believed that the mere existence of the past relationships was sufficient to establish its case, but it

thereafter disaffirmed any actual partiality, fraud, or wrongdoing. See p. 28, *infra*. As a result, Petitioner furnished no proof whatsoever that it did not know of the past relationship or that it relied on this assumption in agreeing to arbitrate the matter before the Arbitration Board which included Mr. Capacete.

The District Court itself did not feel compelled to hear evidence on the issue of partiality because of the number of admissions of Petitioner prior to the actual taking of testimony to the effect that Petitioner admitted Mr. Capacete was not actually partial. See p. 28, *infra*. Several times during the trial, the Court indicated that it had decided to rule against Petitioner on this issue (see p. 22, *infra*), and in the decision of the District Court it is confirmed that its ruling was based on the disclaimer by Petitioner of any fraud, partiality or bias on the part of Mr. Capacete. A. 185.

The proceedings in the District Court concerning the challenges of the award consisted of four separate hearings, the last being the actual trial of the case where the testimony of five witnesses was presented. In the first hearing on February 28, 1964, the Court heard argument of counsel, principally on the issue of the effect of the restraining order of the bankruptcy court. A. 22. On June 25, 1965, the second hearing was held by the District Court on several motions pending, principally the motion to set the case for trial. A. 23. The Court denied the motion but set a hearing on the question of vacation of the award. *Ibid.* The third hearing was held on July 16, 1965, and at this hearing counsel presented arguments on the various issues involved. R. V. At the close of the hearing on July 16, 1965, when counsel for Respondents, Mr. Currie,

attempted to respond to certain of the allegations made by Petitioner to the Court previously during the hearing, the Court stated, ". . . I don't have more time" [R.V, 138(41)] and strongly indicated its desire to close the hearing at that point. The Court added, to assure Respondents that they would have ample opportunity to submit evidence,

> "I know your views on these two points [concerning the issue of partiality and the effect of the restraining order], I am not going to decide any more than these two points until I believe I can render a decision on these two points, and I have to consider the other ones, then I will say so, and if I say that I can render a decision on these two points and *I need support on the evidence for that, I will also let you know.* I will set a hearing." *Id.* at (41-42). (Emphasis added.)

Counsel for Respondents then attempted to argue further against contentions of Petitioner on the partiality issue and tendered to the Court various evidence to support its position on the issue, but the Court stated,

> "I will decide on the papers that the Court has. If I reach the conclusion that I cannot enter a fair decision on any of these points, that I may need additional argument, that I may need evidence, I will so decide." *Id.* at (43).

Counsel for Respondents described evidence that it desired to present on the issue of partiality and offered this evidence to the Court, and the Court indicated to Respondents that it would later have that opportunity if it became necessary to try that issue, but that the hearing was then closed. *Id.* at (44). Respondents relied on this understanding from the Court, and the Court

never subsequently allowed trial on the issue of partiality.

(1) THE "TRIAL"

It became apparent early in the fourth hearing that the District Court had determined it needed no evidence on the challenges of the award by Petitioner with the exception of the last challenge, the issue of admission of certain exhibits of Respondent Samford. In short, the Court had resolved the four other challenges in favor of Respondents as matters of law, the Court requiring no proof and basing its decision on the pleadings and the judicial admissions and stipulations of Petitioner to the Court.

The District Court opened the hearing of February 14, 1966 by stating it understood the matter before it to be the challenge made by Petitioner against the award, and that if the Court found there was no merit in the challenge, the Court would enter judgment in accordance with the award. A. 87. Mr. Romero, counsel for Petitioner, responded that this understanding of the Court was correct. *Ibid.*

The Court then stated that the burden of proof was on Mr. Romero (as counsel for the objecting party, Petitioner) and Mr. Romero replied that the Court was correct. *Ibid.*

To open Petitioner's case Mr. Romero first outlined all the various challenges of Petitioner to the award. As to the two objections as to when hearings were held by the arbitrators and when the award was rendered, Mr. Romero again admitted that the procedure followed by the arbitrators and the parties had been expressly agreed to and stipulated by the parties. A. 90.

(a) ANOTHER DISCLAIMER OF PARTIALITY

In Mr. Romero's statement of the partiality issue in his outline of contentions, Mr. Romero again made it clear by judicial stipulation that Petitioner admitted Mr. Capacete was not *actually* partial:

> "Mr. Romero: . . . One of the allegations is that one of the arbitrators had prior business relationships with one of the parties, which fact was not disclosed to this plaintiff Commonwealth Coatings. *We want to make it known that we are in no way attacking the arbitrator's integrity. We believe him to be an honorable man.*
>
> "The Court: *I believe you have said that all the time that you have come in here.*
>
> "Mr. Romero: We are attacking the other party who knew and should have known that this was a matter to be disclosed . . . ." A. 88. (Emphasis added.)

The same disclaimer had been readily made by Petitioner to the Court in the previous hearings. R. IV, 137 (2); A. 75, 80, 81.

(b) THE COURT'S RESTRICTION OF TRIAL TO THE SOLE ISSUE

Petitioner apparently planned to present testimony on the issue of Respondents' alleged duty to disclose. A. 91. The Court immediately interrupted this by limiting the hearing to another issue, the admission of certain exhibits by Respondent Samford on the last day of the arbitration hearing, stating,

> "The Court: No, let me hear the other party. As far as I have been able to ascertain from what

you have stated, *this hearing could be very short, if we take the record of what happened before the arbitrators.* If they agree that the Court may, as regards some of your challenges, go into those hearings *to show that these documents were presented lately and you were not permitted—.*" A. 91. (Emphasis added.)

Mr. Romero then interrupted the Court because trial on this issue alone would change his presentation of the case,

"I will have to bring testimony of the arbitrators themselves, Your Honor." *Ibid.*

The Court asked for Mr. Currie's remarks on behalf of Respondents. In addressing himself to the first issue mentioned by Mr. Romero; the issue of partiality, Mr. Currie began to reply to derogatory implications made by Petitioner concerning the letter written by Mr. Currie which stated in part that Petitioner could, with the consent of Respondent Samford, nominate another arbitrator to replace its deceased arbitrator so long as the new arbitrator did not have an interest in the litigation and was not involved in the litigation. The Court interrupted Mr. Currie, to say,

"That argument [of Petitioner], I am not going to pay any attention to that.

"Mr. Currie: *No need to go into that?*

"The Court: If they have the right [to impose the same condition] they should have exercised it, regardless of whether your client insisted on that requirement as to the other arbitrator." A. 92.

Mr. Currie then turned to the remaining issues raised by Mr. Romero, the issues of admission of exhibits, holding of hearings on Sunday and Labor Day, and the

rendering of the award more than thirty days following close of the oral hearings. A. 92-95.

The Court then commented on two of the allegations of Petitioner, the allegation as to the effect of the restraining order and the allegation the award was void by reason of having been entered more than thirty days following the close of the oral hearings. A. 96. As Mr. Currie began to deal with these subjects, the Court stopped Mr. Currie, saying, "I don't believe you need to deal. I have heard Mr. Romero and *I believe the Court isn't going to accept those challenges.*" A. 96. (Emphasis added.)

The Court having indicated how it would rule on these issues, Mr. Currie then sought the advice of the Court concerning what else might be furnished by Respondents in the way of clarification of what was to be decided at the hearing,

> "All right sir. Well, with that, is there any other area of the case where Samford may respond to further clarify the issues to be decided at this time?" A. 96-97.

The Judge stated that the only issue the Court was concerned with was the issue of admission of exhibits, stating,

> "Well, *the only thing I am concerned with and I believe I should hear something about it, is the fact that Mr. Romero has stated today that they were not permitted to examine evidence and to offer evidence to rebut certain documents and so forth, which that (sic) goes to the very essence of the arbitration award,* because the arbitration award is based simply on partial evidence from one of the parties and the other party isn't permitted to rebut that evidence or to bring other evidence to answer it, then I believe that goes to the merits of

the award, and the Court may be justified in vacating the award and sending the case back to the Board of Arbitrators, or any other arbitrators to pass on the question." A. 97.

Mr. Currie then attempted to present some background information concerning the procedures followed in the hearing and the qualifications of the parties involved, but the Court responded that this did not answer Mr. Romero's allegation concerning the *admission of documents*, commencing the following colloquy between the Court and counsel for both parties immediately preceding the taking of testimony at the hearing:

"The Court: That still does not answer Mr. Romero's allegation that they were deprived of examining those documents, of the necessary time to come to the Arbitration Board with evidence to rebut those documents or explain those documents. That's what he says, and *that's what the Court is interested in.*

"Mr. Currie: We would respectfully disagree. We state there was ample and total opportunity. There was no objection, no request for additional time, and they did have full privilege to examine everything and cross examine *and we are ready to submit proof and if that's the only issue before the Court I will not address myself further.*

"The Court: *I believe that's the only issue at this hearing.*

"Mr. Romero: *If that's the only issue the Court will hear* I will change my order and call as my first witness Mr. Dwight Chapman." A. 98-99. (Emphasis added.)

After hearing a general summary of allegations made by Petitioner, after again hearing another admission

by Petitioner as to the integrity of Mr. Capacete and the fact that Petitioner was not attacking Mr. Capacete but Respondent Samford, after again hearing from Petitioner that the procedure followed by the Board for the holding of hearings on Sundays and Labor Day and for the rendering of the award more than thirty days after the close of the oral hearings had been stipulated to by both parties, and since the issue of the effect of the bankruptcy restraining order could be resolved on the pleadings, *the Court determined that it needed to hear evidence only on the issue of the question of the propriety of the admission of the exhibits submitted by Respondent Samford on the last day of hearing.* Nothing could be plainer than the language immediately quoted above showing *what issue was to be tried in the District Court at the hearing and that this issue, the admission of certain exhibits, was the sole issue.* In a word, the Court felt that if a meritorious objection to the admission of an exhibit had been made by Petitioner, this would be dispositive of the case, and with the express consent of Petitioner, the case would be sent back to the same Board of Arbitrators.

(c) THE DECISION OF THE DISTRICT COURT CONFIRMS THAT THE SOLE ISSUE TRIED WAS THE PROPRIETY OF ADMISSION OF CERTAIN EXHIBITS.

As subsequently reflected by the decision of the District Court, as to the issues of the effect of the restraining order and the rendering of the award more than thirty days following the close of the oral hearing, the Court stated that these issues:

> "... were dealt with at the hearing of Feb[illegible]ry 14, 1966, and the Court indicated (p. 1[illegible] Tr.)

that it was not impressed by them. The opinion of the Court has not changed, and they are overruled." A. 184-185.

As to the issue of holding hearings on Sunday, the Court indicated its prior opinion by stating in its decision that the objection of Petitioner was "too frivolous to merit discussion." A. 185. In other words, at the February 14, 1966, hearing the Court felt that as a matter of law it could resolve these issues without the taking of testimony, and the Court so ultimately ruled; the Court had resolved the restraining order on the pleadings, and Petitioner had agreed to the other procedures followed by the Board to which it later took exception.

As to the issue of partiality, the District Court grounded its decision on the fact that Petitioner had "expressly disclaimed any such imputation [of bias, partiality or fraud on the part of Mr. Capacete]." A. 185. And the Court noted further that Petitioner had failed to offer any evidence of "evident partiality" which, as the Court interpreted the standard under the Federal Arbitration Act, was understood by the Court to mean no evidence of any *actual* partiality. Plainly the Court felt on the issue of partiality that Petitioner not only did not intend to offer any proof of actual partiality but expressly disclaimed any such actual partiality, and accordingly at the trial there was no evidence to receive on that issue. In short, the District Court felt that the disclaimer by Petitioner of actual partiality resolved the issue, and no testimony was warranted.

(d) THE TESTIMONY

These conclusions about the framing of the issue prior to the taking of testimony and the reasons why

the Court limited the issue at trial to the issue of admission of exhibits are conclusively confirmed by numerous incidents during the taking of testimony where one party or another would begin to stray from the sole issue of admission of exhibits and the Court would quickly caution the party to return to the issue. The incidents occurred chronologically as follows:

(1) During cross-examination by Mr. Currie of the first witness, Mr. Dwight L. Chapman, the arbitrator appointed by Respondent Samford, when Mr. Currie asked Mr. Chapman to describe the initiation of the arbitration proceedings and the appointment of arbitrators, the Court interjected,

> "I believe we are losing time. I don't want any dilatory tactics. We are only inquiring about what they claimed. *That the documents came at the 11th Hour, that they weren't permitted to bring evidence to rebut the contents and the Board took the contents of those documents as a bible.*" A. 107. (Emphasis added.)

(2) Then, as Mr. Currie began to offer for admission into evidence at the trial certain documents, the Court stated,

> "The only bearing that any document as to the issues would have, would be that Mr. Romero on behalf of his client *waived the necessity of offering these documents* or *admitted that these documents were to be presented to the arbitrator and that they would have no objection to their admission,* and *he would have no evidence to rebut the documents,* but otherwise I don't think this has any materiality to the issue we are discussing here. All this does is tend to confuse the issue.
>
> "Mr. Currie: Then we will go to the immediate issue at hand. . . ." A. 109-110. (Emphasis added.)

This issue, of course, was the admission of documents into evidence.

(3) After another question and answer, the Court interrupted,

> "You see, we are wasting time. He is testifying about the general hearings. *All we are concerned with here is these documents*, identified as Identification 1 for plaintiff and which they claim were presented on September 2. That's all." A. 110-111. (Emphasis added.)

The documents referred to by the Court were those alleged by Petitioner to have been admitted over its objection.

(4) Shortly thereafter, and just prior to the noon recess, when the witness was referring to his notes to determine a detail about the hearing, the Court suggested to aid in determining whether Petitioner had made an objection and whether Petitioner had had enough time to review Respondent Samford's exhibits,

> "Well, I have to go to the doctor now. We will take a recess until 1:30. In the meantime, you try to refresh your recollection from your notes so that you may be able to testify exactly as to what questions of time and whom you saw and what you saw and what Mr. Romero or his client did and so forth, because that will be more illuminating than anything." A. 115.

(5) After the recess, when Mr. Currie continued with his examination of Mr. Chapman, and asked Mr. Chapman to amplify his previous testimony concerning what the Board of Arbitrators had asked the parties to supply in the way of documentation, and Mr. Chapman began to answer what things were necessary to be

considered to reach a decision on the case, the Court again directed attention to the single issue of whether certain documents were admitted over the objection of Petitioner, in the following language:

> "The Court: The question here isn't what you [Mr. Chapman] had to consider regarding that. *I believe the issue to be tried here is that some certain documents were submitted which are these documents, that they were submitted by the defendants or by Samford to the Board of Arbitrators and that the Plaintiff did not have any opportunity to consider those documents, to bring evidence as regards the matters in those documents and so forth, because the Board of Arbitrators closed the hearings and wouldn't permit them to. That's what is in evidence before the Court, not what they did or may have done.*" A. 117. (Emphasis added.)

(6) At the end of the testimony the Court again reminded the parties that the *only issue* before the Court at this hearing was whether Petitioner had made objections to admission of exhibits of Respondent Samford. The Court stated,

> "Anyway I want counsel to understand me clearly. *The only issue that is important to me is that issue about whether the Arbitration Board against your objections considered these documents without giving you an opportunity to look at those documents and examine them and challenge the validity of the documents or explain that they didn't mean what they purported to mean.* No matter whether they were engineers, experts, you could have brought somebody else to show that they were wrong. Of course the evidence is contradictory. You have testified one way and Mr. Chapman and Mr. Capacete and Mr. Martinez have testified the other way. The only piece of evidence we

had in order to clarify the situation was this tape recorder. This tape recorder may show that you objected and they did not pay any attention to your objection." A. 177-178. (Emphasis added.)

(e) THE DISTRICT COURT RECOGNIZED THAT THE ISSUE OF EVIDENT PARTIALITY HAD NOT BEEN TRIED.

At several times during the trial, the Court indicated it would rule against Petitioner on the issue of evident partiality, this ruling being based on the admissions made in Court by Petitioner. See p. 28, *infra.*

After the testimony had been taken and as the Court was bringing the hearing to a close, suddenly at this point in the proceedings Mr. Korngold, co-counsel for Petitioner, addressed the Court and attempted to raise another issue, saying, "I have one other issue." A. 179.

The Court responded by commenting on the procedure to be followed in the transcribing of the tape, but Mr. Korngold attempted to address the Court's attention to another issue, "It is on a completely different point, Your Honor." A. 180.

When the Court understood that Mr. Korngold was referring to a different subject, the issue of "evident partiality," the Court asked, *"Why did you not raise that different point when I said the only issue here is this?" Ibid.* Mr. Korngold then attempted to argue that he had raised the point previously, but the Court stated that on the issue of "evident partiality," he had, ". . . already decided to rule against you [Petitioner], period." *Ibid.*

Recognizing that the issue tried was that concerning the admission of exhibits, and not the issue of evident

partiality, the Court advised Mr. Korngold of the procedure it would follow if Petitioner desired to address the Court further on the issue of evident partiality. The following discussion occurred:

> "The Court: No, you have the opportunity, as I am not deciding that case now, you will have the opportunity of asking the Court to reconsider.
>
> "Mr. Korngold: That's what I am asking now.
>
> "The Court: All right, you are asking me now and I say I will give you time later on but I am not going to hear anything further here. It is almost five.
>
> * * *
>
> "The Court: You have heard my position. I am not deciding anything, even as to the points I said that I was going to rule against you. After I give a decision you might come in and say, we want to convince you to reconsider.
>
> "Mr. Korngold: I just wanted to let you know there was more than one issue as to the Commonwealth Coatings position. That's why I wanted to make the record clear." A. 180-181.

Although the decision of the District Court was adverse to Petitioner on the issue of evident partiality, Petitioner did not seek reconsideration by the District Court and request an opportunity to present testimony in support of its position on that issue.

C. RESPONDENTS ARE ENTITLED TO A TRIAL OF THE CASE UNDER THE "APPEARANCE" STANDARD OF "EVIDENT PARTIALITY", AS ANNOUNCED BY THE SUPREME COURT.

As the District Court plainly viewed the test applicable to Mr. Capacete to be whether or not he was *actually partial*, and because of the admissions of

Petitioner the District Court did not allow testimony on the issue of partiality, Respondents are entitled to a trial under the "appearance" standard of "evident partiality" as announced by this Court. This Court has held, in effect, that the District Court erred as a matter of law in following the standard it used to evaluate the challenge of "evident partiality."

Since the District Court resolved this issue as a matter of law on the basis of the admissions in open court of Petitioner and without testimony, and since this ruling was found erroneous by the majority opinion in this case, *testimony is now mandatory in order to present the remaining essential defense to a charge of "evident partiality" under the "appearances" test, namely that Petitioner had knowledge of the prior relationship of which it now complains.*

(1) ON A NEW TRIAL RESPONDENTS WILL PROVE THAT PETITIONER HAD KNOWLEDGE OF THE ALLEGEDLY DISQUALIFYING RELATIONSHIP.

The affidavit of A. C. Samford, Jr. and Roger Dickinson, executive officers of Respondent Samford during the occurrence of the events relevant to this proceeding, and the affidavit of counsel for Respondents (originals on file with the Clerk of the Court) are printed in the Appendix to support this Petition for Rehearing. See p. 46, *infra*. These affidavits show that there is every reason to believe that Petitioner knew of the previous business relationships.

Representatives of Petitioner, both management and counsel, were continually in contact with Respondent

Samford and their counsel. Petitioner has vehemently complained that certain services by Mr. Capacete or his firm were performed on the same projects involved in this same arbitration. It is highly significant that Petitioner was the painting subcontractor of Respondent Samford on *all* of its principal projects in Puerto Rico, and since the work performed by Mr. Capecete or his firm was not secretive, but was performed in daylight, in the open, and known to many, Respondents believe that it can be shown Petitioner had knowledge of the performance of these services.

The representatives of Petitioner, especially its chief executive in Puerto Rico, Manuel Nieto, were regularly and frequently in the offices of the Samford Companies in Puerto Rico, generally at least weekly, from the time the painting contracts were entered into with Petitioner in 1960 and 1961 through the abandonment of the work by Petitioner in July, 1962, and often thereafter during settlement negotiations, the representatives of the parties were in frequent contact.

The affidavit of Messrs. Samford and Dickinson describes in detail a particular incident occurring on the Laundry Project of Respondent Samford at the Puerto Rico Medical Center where Petitioner was the painting subcontractor. In order to resolve the dispute between the owner and Respondent Samford involving a floor topping problem, Mr. Capacete was engaged by Respondent Samford to testify as to the causation. Although the parties were originally to arbitrate the matter, due to the eminent reputation of Mr. Capacete as an expert and man of honor, the owner agreed to abide by Mr. Capacete's decision in lieu of arbitration. This development and victory was widely known and

discussed in the construction industry in Puerto Rico and especially among prime and subcontractors on the Puerto Rico Medical Center. Petitioner was a subcontractor of Respondent Samford there and was performing painting work on the project during the same period as this Laundry Project dispute and negotiations of this dispute using Mr. Capacete's services. Accordingly, Respondents submit and believe that it can be shown Petitioner had knowledge of these particular services, and Respondents earnestly request that the opportunity be provided to make this showing to prevent unjust results of a decision based on facts and issues never tried by the parties or lower court.

II. THE COURT ERRED IN FAILING TO CONSIDER THE ADMISSION OF PETITIONER THAT MR. CAPACETE WAS INNOCENT OF ANY ACTUAL PARTIALITY, BIAS OR IMPROPER MOTIVE, WHICH ADMISSION NEGATES ANY POSSIBLE APPEARANCE OF WRONGDOING.

This Court in its opinion states,

> "It's true that *petitioner does not charge before us that the third arbitrator was actually guilty of fraud or bias in deciding this case*, and we have no reason, apart from the undisclosed business relationship, to suspect him of any improper motives." (Emphasis added.)

Respondents respectfully submit that to view the numerous admissions by Petitioner as to the honesty and integrity of Mr. Capacete and the statements of Petitioner that it was not attacking Mr. Capacete, but Respondent Samford, as a mere *absence of a charge* of

fraud or bias on the part of Mr. Capacete is an inaccurate statement and evaluation of the actual facts of the case. It is one thing not to charge actual partiality, and it is an entirely different matter, and a far more meaningful circumstance, to plainly admit in open court that there is no actual partiality.

The decision of the Court and the concurring opinion in effect adopt an "appearance" test of when an arbitrator should be required to volunteer information about previous relationships. In the words of the Court's opinion,

> ". . . the single requirement [is] that arbitrators disclose to the parties any dealings that *might create an impression of possible bias.*" (Emphasis added.)

The fact of the case, however, as recognized in the dissenting opinion of Mr. Justice Fortas, is that Petitioner has freely and repeatedly admitted that there was in fact no actual bias of any sort and that Mr. Capacete was not affected in any respect, consciously or subconsciously, by the past, terminated business relations.

Surely, at some point, reality can overcome appearances. The Court has observed that apart from the "undisclosed business relationship" there is no reason to "suspect" Mr. Capacete of any improper motives. If the Court has any doubt, or any "suspicions" about the effect of the business relationship, surely the number of admissions of the lack of such effect of such relationships readily made by Petitioner entirely dispel any such suspicion. Just as no "appearance" of interest will arise where a party apprised of a damaging fact freely waives it, so here that Petitioner repeatedly dis-

claimed in public any wrongdoing by Capacete *must* vitiate any appearance of "possible bias." To find otherwise, it is most respectfully submitted, is to cause a most unjust result requiring that appearances control over the reality of the situation, and to impose a harsh and formalistic rule requiring a severe result to cure a supposed evil *which in fact is admitted not to exist.*

A. THE ADMISSION BY PETITIONER

We would entreat the Court to review the following portions of the record where Petitioner entirely disposes of any imputation of actual partiality on the part of Mr. Capacete:

In the hearing before the District Court, held June 25, 1965, Mr. Romero, counsel for Petitioner, stated,

> "*. . . this isn't an allegation of fraud against the arbitrators . . . .*" R. IV, 137 (2). (Emphasis added.)

Mr. Korngold, New York counsel for Petitioner, then added unequivocally,

> "I would like the record clear that *at no time is Mr. Romero or myself accusing any of the arbitrators with doing anything fraudulent.*" R. IV, 137 (2). (Emphasis added.)

At the hearing before the District Court on July 16, 1965, Mr. Romero again stated,

> "*Now, we don't mean to say that we believe that the chairman acted improperly in any way . . . .*" A. 75. (Emphasis added.)

The District Court shortly thereafter summarized the position of Petitioner by stating,

> "I know Mr. Capacete pretty well and I know his caliber as an engineer and as a man of science,

there is no doubt. *And I believe that nobody here is trying to raise any reflection whatsoever on the ability, honesty and integrity of Mr. Capacete . . .*" (A. 80) (emphasis added),

to which Mr. Romero for Petitioner responded,

"*That's our position and we have so stated numerous times.*" A. 81. (Emphasis added.)

At the hearing before the District Court on February 14, 1966, Mr. Romero for Petitioner once again admitted that it was making no challenge of the integrity of Mr. Capacete and, in fact, the Court was assured of Mr. Capacete's honor,

"*We want to make it known that we are in no way attacking the arbitrator's integrity. We believe him to be an honorable man*" (A. 88) (emphasis added),

to which the Court responded,

"I believe you have said that all the time that you have come in here." A. 88.

Mr. Romero, on direct examination by his associate counsel representing Petitioner, in answer to the question whether he would have objected had he known of the previous business relationship between Samford and Foundation Engineering Company, answered in part,

"I don't think I would have objected because I know Mr. Capacete . . . ." A. 151.

The District Court thereafter in its decision twice stated that it found as a fact that Petitioner,

"*. . . disclaimed any imputation of bias, partiality, or fraud on the part of the arbitrator involved. . . .* it also has *expressly disclaimed any such imputation* [of evident partiality] . . . ." A. 185. (Emphasis added.)

And the Court of Appeals expressly confirmed the District Court's conclusions, holding,

> ". . . the [District] Court was well warranted in finding that *there was no prejudice or bias* manifested in the course of the proceedings. Indeed, *there was considerable evidence which negatived it.*" 382 F.2d 1010, 1012; A. 194. (Emphasis added.)

B. PETITIONER RATIFIED AND CONFIRMED THE TOTAL IMPARTIALITY OF MR. CAPACETE AS AN ARBITRATOR.

Petitioner's concurrence in the fairness and impartiality of Mr. Capacete was absolutely confirmed when Petitioner resubmitted certain issues to the arbitrators following the award and later expressed unqualified willingness to the District Court to resubmit matters to the same Board of Arbitrators. Following the rendition of the award and after Petitioner had commenced suit challenging the award on the various grounds, including the ground of "evident partiality," on March 10, 1964 Petitioner sought reconsideration of the award from the same Board of Arbitrators without objection as to their qualifications to hear the matter. Respondent Samford filed two briefs responding to this motion on March 18, 1964 and August 1, 1964. However, the arbitrators took no further action in the matter following the award.

At the opening of the trial of the case, when the Court focused attention on the sole issue of admission of exhibits, the Court stated,

> "Perhaps that may require that I resubmit the case to the arbitrators and have an additional

> hearing in which you are permitted to go over those documents," (A. 91);

Mr. Romero expressed his total consent to this remedy, saying, "All right." *Ibid.* Later the Court had occasion to mention again it might, "send the case back to the Board of Arbitrators," but Petitioner took no exception to this possibility. A. 97. Following the testimony concerning whether Petitioner had made objections to the introduction of certain exhibits by Respondent Samford and in the discussion of what procedure would be followed if such an objection had been made, the Court again suggested the possibility of having the arbitration issues decided again by submitting the record to the same Board. The only comment by Petitioner's counsel was that he believed the Board had expressed that it would feel "very bad" about considering the case any further. A. 174. The Court responded:

> "The Court: I don't believe so. *I believe the Court may rule that the case be resubmitted to the Arbitration Board, for them to consider all the evidence,* give the opportunity if it is shown that you made an objection and you asked for time to rebut that evidence, and *that they receive that evidence and rule on it, because otherwise it would be in a certain way unfair to these arbitrators. I don't find that there is anything wrong about it, and there have been no charges as to the honesty, ability, or anything like that,* but that the best thing, you have to show that, because I am not going to rule on that unless it is shown by the record that you made timely objections to vital documents and that they refused to hear those objections, that you requested time to present evidence to contradict the contents of those documents or to explain them in a way different from what the Board finds. A. 174-175. (Emphasis added.)

Throughout this discussion of resubmittal of the case to the Board of Arbitrators, Petitioner made absolutely no objection to the same Board's ability to enter a new, valid, binding arbitration award.

It can be fairly and correctly said that Petitioner ratified and confirmed the qualifications of the arbitrators by being ready and willing to resubmit the case to the same Board. Obviously, Petitioner would not have been at all so inclined if it believed that Mr. Capacete was to the least extent motivated in favor of Respondent Samford.

III. IF MR. CAPACETE HAD BEEN SERVING AS A "JUDGE OR JUROR," HE WOULD NOT HAVE BEEN DISQUALIFIED FOR INTEREST.

A. DISQUALIFICATION OF JUDGES

The majority holding of this case is that a duty to disclose information on relationships between an arbitrator and a party to the proceeding exists when the relationship would disqualify a judge or foreman of a jury in similar circumstances; failure to observe this duty, even if the party "innocently forgets," would constitute "evident partiality" under the United States Arbitration Act, 9 U.S.C. §10, and require vacation of the award. Whether Mr. Capacete's relationship to Respondent Samford would be disqualifying if he were a judge or foreman of a jury in a court action has not been subject to proof in any of the court proceedings below or appellate hearings thereafter, but the facts of the record amply demonstrate he would not be disqualified.

With regard to the disqualification of judges for

"interest" in the subject matter before them it is a well-settled rule that the relationship must involve or create a "substantial" interest before disqualification will be required. Congress confirmed this principle by changing the language of 28 U.S.C. §455, "Interest of Justice or Judge" from,

> "Any justice or judge of the United States shall disqualify himself in any case *concerned in interest in any suit* . . ." (emphasis added)

to,

> "Any justice or judge of the United States shall disqualify himself in any case *in which he has a substantial interest* . . . ." (Emphasis added.)

While legislative history is silent on this point[1] it is apparent from the literal language of the statute that Congress meant to raise the threshold above which disqualification would be required. An example of the proper application of the aforesaid statute is *Lampert v. Hollis Music Inc.*, 105 F.Supp. 3 (D.C.E.D.N.Y. 1952). In that case the judge was not held to be disqualified under §455 because he owned 20 shares of one of the corporate defendants. Over thirteen million shares of stock were outstanding. To say that the existence of a pecuniary interest, however small, and without more, would automatically disqualify a judge is incorrect as *Lampert* indicates.

The case of *Tumey v. Ohio*, 273 U.S. 510 (1927), cited in the majority opinion does not support or provide authority for the Court's decision. There the U.S. Supreme Court found the direct, present, not past, pecuniary interest of the mayor-judge to be substantial, saying:

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[1] H. R. REP. No. 308, 80th Cong., 1st Sess. (1948).

> "The mayor received for his fees and costs in the present case $12, and from such costs under the prohibition act for seven months he made about $100 a month, in addition to his salary. We can not regard the prospect or receipt or loss of such an emolument in each case as a minute, remote, trifling or insignificant interest." 273 U.S. 510, 531-32.

This finding was essential for the Court had concluded earlier:

> "From this review we conclude that a system by which an inferior judge is paid for his service only when he convicts the defendant has not become so embedded by custom in the general practice either at common law or in this country that it can be regarded as due process of law unless the costs usually imposed are *so small* that they may be properly ignored as within the maxim de minimis non curat lex." (Emphasis added) 273 U.S. 510, 531

The dictum of the *Tumey* Court which is quoted by the majority opinion in saying, ". . . in *Tumey* the Court held that a decision should be set aside where there is 'the slightest pecuniary interest' on the part of the judge . . ." was used by the *Tumey* Court in rebutting the State's argument that "old process is due process" and referred to common law practice in England prior to 1776. It is respectfully submitted that in fact judges today will be disqualified only when there is an interest in the subject matter that is substantial, notwithstanding that it is pecuniary. Here Mr. Capacete had no interest whatsoever in the subject matter.

The amount of compensation received by the arbitrator from past business with Respondent is important on the question of "substantiality"; however, other

factors are equally important. The method of negotiating the fee of Mr. Capacete's company is critical, for the compensation may have been only cost and without profit. The total operating budget of Respondent Samford is pertinent, as is the presence or absence of similar testing firms on the subject construction jobs. The change of ownership, management, and operations of Respondent further demonstrates the absence of a personal interest by Mr. Capacete in the proceeding's outcome. None of these facts were shown below because the rule of law under which the District Court resolved the issue of partiality did not require such proof and the District Court did not permit testimony on the issue.

A further consideration that goes into the decision of a judge's qualification to hear a certain matter is whether or not the interest in the subject matter is a "present" interest, as opposed to a "past" interest. The United States decisions require that the judge's interest be a "present" one before disqualification will be found.[1] A good example is the rule governing the propriety of judges hearing cases that are argued before their court by ex-law partners. Here Mr. Capacete had appearing before his arbitration panel a party with which he had had a past professional relationship, not nearly so close as that of law partners. It has been found by one distinguished author, Mr. John B. Frank in "Disqualification of Judges," 56 *Yale L. J.* 605 (1947), that the overwhelming practice in the United

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[1] *Darlington v. Studebaker-Packard Corp.*, 261 F2d 903 (7th Cir. 1959), *cert. denied* 359 U.S. 992 (1959) (former client of judge was a party); *Johnson v. Marietta & N.G.R.R.*, 70 Ga. 712 (1883) (judge was a former director of a corporate party).

States judicial system is not for a judge to disqualify himself where an ex-law partner argues before him. Mr. Frank found no single instance of disqualification. This Court has affirmed the rule in this regard more than once, the most famous occasion being the case of *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161 (1945), *rehearing denied*, 325 U.S. 897 (1945).

In the present case Mr. Capacete's associations with Respondent ceased more than a year before the arbitration of 1962.[9] No other relationship or independent interest that would disqualify the arbitrator has been suggested by Petitioner.

A third element found in the disqualification of judges for "interest," is "directness." An example of the required "directness" is found in the following quotation from *Petition of Farber*, 260 Mich. 652, 660-661 (1932):

> "Where a judge or corporation in which he is a stockholder is not a party to the suit, the interest which will disqualify him must be a direct interest in the subject matter of litigation or in the outcome of the suit, so that he or the corporation will be directly affected through pecuniary or property loss or gain or accrual of right or liability."

Note that "directness" as explained here does not mean lack of an intermediary or conduit, but refers to the personal or direct receipt of the benefit or loss involved.

The best example of "directness" is found in the *Tumey* case, *supra*. There the Court noted that it would violate due process if ". . . the judge . . . has a *direct*, personal substantial pecuniary interest in reaching a

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[9] A. 139.

conclusion against him . . . ." (Emphasis added.) The Court then found a "direct pecuniary interest" because there was ". . . no way by which the mayor may be paid for his service as judge, if he does not convict those who are brought before him." 273 U.S. at 520.

It is respectfully submitted that there is no evidence Mr. Capacete had a "direct" interest in the arbitration proceeding, and should this issue be subjected to proof in a new trial this conclusion will be established beyond doubt.

The fourth common element found in the law governing disqualification of judges is a requirement that the interest involved be pecuniary or proprietary in nature. Note that disqualification for "bias" is not an issue in this case. The term "interest" found in the Congressional statutes preceding 28 U.S.C. §455 was initially and has since continuously been defined in terms of the common law meaning, i.e. pecuniary or proprietary.[4]

It is respectfully submitted that what evidence was introduced in lower court proceedings on the nature of Mr. Capacete's interest in the subject matter of the arbitration demonstrates that neither he nor his company had a monetary, proprietary or beneficial interest in the result of that proceeding. The fees for the professional relationship between 1957 and 1961 had been received by Mr. Capacete's company, hence these were not contingent on Respondent prevailing in the arbitration matter. The prospect of future business dealings is not pecuniary or proprietary in the sense used here,

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[4] *Adams v. U.S.*, 302 F.2d 307 (5th Cir. 1962); *U.S. v. Bell*, 351 F.2d 868 (6th Cir. 1965), *cert. denied* 383 U.S. 947 (1966).

and can scarcely be deemed "beneficial" with Respondent Samford phasing out its operations in Puerto Rico,[5] changing ownership, management, and even using Mr. Capacete's competitor for testing services previously provided by Mr. Capacete's firm.

To apply the foregoing legal principles governing judge disqualification to Mr. Capacete conclusively demonstrates that because he did not have a direct and present interest in the subject matter that could be described as pecuniary or proprietary in nature, he would not have been disqualified if serving as a judge or juror in trying this dispute. It is also submitted that further proof on the issue of "substantiality" would absolutely confirm that the interest arising from past professional relationships was not so large as would disqualify a judge or juror in similar circumstances.

B. DISQUALIFICATION OF JURORS

Disqualification of jurors for "interest" in the subject matter of a judicial case revolves around what may be alleged in an objection for "cause" before trial. The juror's "interest" may be direct and personal, or through an intermediary, or it may arise from a relationship the juror has with one of the parties.

It is ironic that the standard used in disqualifying jurors for interest should be used by the Court in determining when a duty to volunteer information exists for an arbitrator under the Arbitration Act. This is because it is hornbook law that a failure by the concerned party to object to the juror in question in a timely fashion will waive the right.[6] This is true even

[5] Brief of Respondents at 146.

[6] *United States v. Ragland*, 375 F.2d 471 (2d Cir. 1967), *cert. denied* 390 U.S. 925 (1968); *Fabian v. United States*, 358 F.2d 187 (8th Cir. 1966), *cert. denied* 385 U.S. 821 (1966).

when the disabling fact is unknown to the party, provided other facts are known which put him on notice to the advisability of an investigation and due diligence would have revealed the critical data.[7] In the instant case, the natural obligation to exercise due diligence in investigating was discarded in favor of an unknown, unreasonable, and unnatural "duty" to volunteer placed upon the other party, but the substantive law as to when that duty exists was partially borrowed from the law governing jury challenges and qualifications.

The judicial standards governing juror disqualification are drawn from statutes and the common law. Until 1948 the qualifications of federal jurors were determined in accordance with those required by the highest state court of the state in which the federal court sat.[8] Now the federal statutory law on the subject is found in 28 U.S.C. §1863 which permits "(a) . . . district judge for good cause . . ." to exclude a person from jury service. Section 1870 of Title 28 of the U.S.C. allows the court to determine "All challenges for cause or favor . . . ." Discretion is vested in the trial judge to determine what qualities or factors will cause actual prejudice or fundamental unfairness. Preexisting case law on the subject will be and is drawn on heavily.

It is clear that a pecuniary or proprietary interest in the matter at bar will, unless waived, disqualify a prospective juror. The most common example of this is where a prospective juror is a stockholder in a corporation that is either a party in the lawsuit, or has a

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[7] *Batsell v. U.S.*, 217 F.2d 257 (8th Cir. 1954).
[8] Act of March 3, 1911, Ch. 231 §§ 275, 278, 38 Stat. 1164, 1165.

pecuniary interest in it (i.e. as insurer of the defendant in a negligence suit).[9]

The common law will normally disqualify, unless waived, a prospective juror that is *currently* employed by a party,[10] or is closely related to a person that is so employed.[11] But the relationship must be a *current* one and if the person has terminated a past employment relationship it will not be deemed a disqualifying fact,[12] even if objection is made by challenge for cause.

Several types of business relationships have been scrutinized by courts in deciding if a disqualifying interest arises therefrom. Generally an *existing* and *substantial* business relation with a party will permit a challenge for cause. Where the business relationship is terminated, even with an expectation of renewal of the insurance policy in the case, it has been held that there is no disqualification required as a matter of law.[13] Simple business relationships *in the past*, with no more than the ordinary hope of their resumption, have not been deemed disabling.[14] Thus, the business relationship to disqualify a prospective juror must be a *present* relationship. Similarly, other business relationships have been found not disqualifying in view of their insubstantial nature.[15] Presumably this was also the reason why

[9] *Texas Power & Light Co. v. Adams*, 404 SW2d930 (Court of Civil Appeals of Texas 1966); *Ozark Border Electric Cooperative v. Stacy*, 348 SW2d586 (Springfield Court of Appeal 1961).

[10] *Francone v. Southern Pac. Co.*, 145 F.2d 732 (5th Cir. 1944).

[11] *Dodson v. Pennsylvania Railroad Company*, 142 F. Supp. 509 (D.C.W.D. Pa. 1956).

[12] *Missouri Pacific Railroad Co. v. Fikes*, 211 Ark. 256, 200 SW2d 97 (1947); 50 C.J.S. *Juries* §221 (a)(2).

[13] *Katzenbach v. S. C. Johnson & Son, Inc.*, 273 Wisc 621, 79 NW2d 249 (1956).

[14] *Dunagan v. Appalachian Power Co.*, 23 F.2d 395 (4th Cir. 1928).

[15] *U.S. v. Smith*, 306 F.2d 596 (2d Cir. 1962), *cert. denied* 372 U.S. 959 (1963); *Walker v. State*, 237 Ark. 84, 371 SW2d 135 (1963).

the Supreme Court in Oregon thought the relation of physician and patient not disabling.[16] It was also the reason why the Fifth Circuit recently refused to disqualify jurors who were employees or policy holders of an insurance company that was admittedly subrogated to a part of the plaintiff's claim.[17] The Court said that in comparison with other claims of plaintiff in the case, ". . . the financial interest of the insurer by reason of its subrogation rights was relatively minor . . . ." *Id.* at 842.

In the arbitration proceeding in Puerto Rico in 1962, Mr. Capacete did not have a pecuniary or proprietary interest in the matter in dispute for neither he personally, nor any property owned by him, nor his company could benefit or lose as a result of the contemplated award. That Petitioner recovered in its claim against Respondents, or Respondent Samford recovered in its counter claim against Petitioner could not redound to the benefit of Mr. Capacete or his company.

It is obvious that these business relationships of Respondent Samford and Mr. Capacete *would not disqualify* a prospective juror. It was a past, terminated, casual relationship. More than a year before the arbitration, Respondent had begun using the services of a company that competed with Mr. Capacete's company.[18] Thus, there was no contingency present in the arbitration proceeding. Past income, furthermore, was shown to constitute less than 1% of the income of the

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[16] *Mount v. Welsh*, 118 Ore. 568, 247 P. 815 (1926)(dictum).
[17] *L. & N. Railroad Company v. Williams*, 370 F.2d 839 (5th Cir. 1966).
[18] See attached affidavit of Amos C. Samford, Jr. and Roger Dickinson, p. 46, *infra*.

firms in which Mr. Capacete had an interest.[19]

Because Mr. Capacete and his company did not stand to benefit or suffer loss from the arbitration proceeding, it is earnestly submitted to the Court that under the rule as enunciated in this case, the arbitrator would not be disqualified under the standards applied to jurors in the United States and therefore was under no duty to volunteer information on his *past, insubstantial,* terminated relationships with Respondent.

IV. THE DECISION OF THIS COURT IS CONTRARY TO JUDICIAL PRECEDENTS, THE FACTS OF THIS CASE AND CONGRESSIONAL INTENT AS TO THE DUTY OF ARBITRATORS TO VOLUNTEER INFORMATION, AND CREATES A TRULY BURDENSOME AND UNREALISTIC DUTY FOR THE UNTOLD NUMBERS OF ARBITRATORS ATTEMPTING TO RESOLVE DISPUTES IN PRIVATE, INFORMAL PROCEEDINGS.

It is respectfully submitted that the creation of a duty to volunteer information by arbitrators under the United States Arbitration Act, 9 U.S.C. §§ 1-15, is done without support of Congressional legislative history or intent.[20]

The duty is created without the support of judicial precedent, for until this case a failure to volunteer information on a prior business relationship with one of

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[19] Brief of Respondents at 143.

[20] H. R. REP. No. 96, 68th Cong., 1st Sess. (1924); S. REP. No. 536, 68th Cong., 1st Sess. (1924); *Hearings on S. 4213 & S. 4214, before the Subcommittee of the Senate Committee on the Judiciary*, 67th Cong., 4th Sess. (1923); *Joint Hearings before the Subcommittee on the Judiciary*, 68th Cong., 1st Sess. (1924).

the parties would not justify vacation of the arbitration award.[11] Further, the two cases cited in the main opinion of the Court are not in point.

The rule in the *Tumey* case, *supra*, on disqualifying a judge who has a *substantial* pecuniary interest in the case before him (under the Fourteenth Amendment), turns as much on the *direct*, *personal*, and *present* nature of that interest as it does on the substantiality. If the true holding were applied to Mr. Capacete as a judge or arbitrator there would be no disqualification.

The case of *Rogers v. Schering Corp.*, 165 F. Supp. 295 (D.C.D.N.J. 1958), *aff'd* 271 F.2d 266 (3d Cir. 1959), is cited by the Court in support of their setting aside, on constitutional grounds, an award where the decision-maker had "the slightest pecuniary" interest in the case. The *Rogers* case, however, involved parties who had agreed to submit to arbitration under the rules of the American Arbitration Association, one of which requires that arbitrators volunteer any information ". . . likely to create a presumption of bias or which he believes might disqualify him . . ." 165 F. Supp. at 298. Thus, the failure to volunteer there violated a *pre-existing contractual duty* and arrangement equal to inquiry. How one can find in the *Rogers* case the justification to vacate an award because an arbitrator, not bound by the A.A.A. rules as here, innocently failed to tell Petitioner about his past acquaintance and terminated services for Respondent is mystifying.

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[11] *Texas Eastern Transmission Corp. v. Barnard*, 177 F. Supp. 123, (D.C.E.D. Ky. 1959), rev'd on other grounds, 285 F.2d 536 (6th Cir. 1960); *Ilios Shipping & Trading Corp. v. American Anthracite & Bituminous Coal Corp.*, 148 F. Supp. 698 (D.C.S.D.N.Y. 1957), *aff'd* 245 F.2d 873 (2d Cir. 1957).

Finally, Respondent would entreat the Court to reconsider the practical impact of its finding a duty to volunteer by arbitrators. Of necessity this ruling will prolong the private contractual process of arbitration as parties will be unaware of the new rule, or if knowledgeable, they will be at loose ends in knowing what should be volunteered. Even Petitioner's attorney recognized the impracticality of imposing such a duty on arbitrators, for he described arbitrators in the context of a duty to volunteer as: "They are innocent babes in the woods sometimes . . . ,[22] explaining Petitioner's position, "If the arbitrators are not told what their duties are by the people who select them, then they are not in fraud." *Ibid.* Inquiries will be naturally withheld in hopes of later using a prior relationship as grounds for judicial appeal (if the final award is adverse). The total thrust of the new duty is away from a natural reliance on self-interest, competition and the adversarial system and sadly would appear to reward indolence, carelessness, or trickery at great cost in time, money and effort. It is unnatural and unreasonable to believe Petitioner, represented by able attorneys, did not have sufficient interest and diligence to inquire and learn about Mr. Capacete to the full extent it desired and therefore waived all right to object to past, open and easily discoverable facts concerning his qualifications.

It will also produce a great and tragic injustice to destroy the work of so many persons for so many years and force a new arbitration where some witnesses are no longer available, memories are more dull, and there is little or no prospect of obtaining more qualified

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[22] R. IV, 137 (2-3).

arbitrators than these three whose unanimous award is now being attacked.

CONCLUSION

For all the reasons stated herein, Respondents respectfully urge the Court to grant this petition for rehearing and remand this case for further proceedings in the Federal District Court. In the alternative, Respondents request that upon rehearing this Court reverse its earlier decision and affirm the lower court decisions and the arbitration award.

This 17th day of January, 1969.

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On the Brief

APPENDIX TO MOTION
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

Commonwealth Coatings Corporation, *Petitioner* v. Continental Casualty Company, Fireman's Fund Insurance Company and A. C. Samford Overseas, Inc., *Respondents*	No. 14 Affidavit of AMOS C. SAMFORD, JR. and ROGER DICKINSON

A. C. Samford, Jr. and Roger Dickinson, after each was duly sworn by a Notary Public as shown below, made the following affidavit for use in the above case on the basis of their personal knowledge and information and belief which they verily believe to be true and correct.

A. C. Samford, Jr. was born in Tennessee in 1916 and received his Bachelor of Science in Civil Engineering Degree from the University of Minnesota in 1946.

He spent most of his youth in Montgomery, Alabama, where his father was an Executive Assistant to Mr. Algernon Blair's construction company. In 1948, his father moved to Albany, Georgia and established A. C. Samford, Inc. Following World War II, A. C. Samford, Jr. and his brother joined their father in ownership and management of this company which engaged in construction work principally in the southeast and in a joint venture in Spain. Thereafter in 1958, the brother was killed in an airplane collision and A. C.

Samford, Jr. and his father continued to operate A. C. Samford, Inc., as well as A. C. Samford Overseas, Inc., with its main operations in Puerto Rico, and A. C. Samford Virgin Islands, Inc., with its operations in St. Croix Virgin Islands. A. C. Samford, Jr.'s father died in February 1961. A. C. Samford, Jr. served as president of these firms, with his home and main office being in Albany, Georgia.

The construction and business responsibilities of the Puerto Rico and Virgin Island operations were primarily delegated to the offices established on these islands under the responsibility of Don Ross, Vice President and General Manager of these operations. Mr. Ross so served during the period Mr. Capacete's firm, the Foundation Engineering Company of Puerto Rico, was engaged to perform the testing, laboratory and other construction services described in this case. Mr. Ross had the authority and control of making such routine and customary construction decisions as selecting testing firms, subcontractors, suppliers, and otherwise managing the construction operations and business of these Samford firms in Puerto Rico and the Virgin Islands.

A. C. Samford, Jr. primarily devoted his attention to operations in the United States, corporate business affairs and a review of the business reports and records supplied by the Puerto Rico and Virgin Island operations, with occasional visits to these islands to inspect their operations and contribute suggestions for solving problems as a particular situation warranted.

A. C. Samford, Jr. was not a close business, personal or social friend or associate of Mr. Jose L. Capacete.

Mr. Samford never personally employed the services of Mr. Capacete or his firm, such administrative decisions being the responsibility of the local management of the Samford Companies in Puerto Rico and the Virgin Islands, and Mr. Samford worked personally with Mr. Capacete only on the Laundry project problem hereinafter described.

In 1962, and approximately a year before the arbitration hearings, Mr. Don Ross, the Vice President and General Manager of the Puerto Rico and Virgin Island operations when Mr. Capacete's firm was engaged for the services described in this case, resigned from the Samford Companies and moved to Chicago, Illinois to work for a cement company.

Roger Dickinson, who was born in New Jersey in 1936, but grew up in Georgia, received the Bachelor of Building Construction Degree from Auburn University in 1960. While a student, he was first employed by A. C. Samford, Inc., in 1956 as a co-op or working student. After first working in the Albany, Georgia operations, Roger Dickinson in 1960 began work under Mr. Don Ross in the Puerto Rico office. After Don Ross left the Samford Companies in 1962, Roger Dickinson became Vice President and assumed general management responsibilities for the Puerto Rico operations. Beginning a year or more before the arbitration, Roger Dickinson caused the Samford Companies to use the services of the Puerto Rico Testing Services, Inc., a competitor of Mr. Capacete's firm, to provide laboratory, testing and consulting services of a type that had previously been provided by Mr. Capacete's firm. The only work performed by Mr. Capacete's firm for the Samford Companies following the departure of Mr.

Ross occurred on the Laundry project at the Puerto Rico Medical Center hereinafter described.

Upon the departure of Don Ross from the Samford Companies, the management of the Virgin Islands operation was assumed by Dick Schierloh. Mr. Schierloh thereafter did not use the services of the Foundation Engineering Company of Puerto Rico.

In December, 1962 (six months or more before the arbitration), all of the stock of A. C. Samford, Inc., A. C. Samford Overseas, Inc., and A. C. Samford Virgin Islands, Inc., was sold to a construction firm of New York City, the Foundation Company, which was wholly unrelated and unconnected with Mr. Capacete and his firm. A. C. Samford, Jr. was elected President of the New York City construction firm and continued to serve in that capacity for its new Samford subsidiaries. However, his principal office and primary responsibility now involved the New York firm's operations. The absence of any substantial new business in Puerto Rico for a year before the arbitration and other business problems in Puerto Rico and the Virgin Islands resulted in the Puerto Rico operations progressively diminishing and as the current construction work was being completed, the forces were being reduced and the operations were substantially smaller and near their end before the arbitration.

The complete change of ownership, the resignation of Mr. Don Ross, the reduction of operations, the new management of Mr. Roger Dickinson and his engagement and use of a competitor of Mr. Capacete's firm were widely known and discussed in the construction industry in Puerto Rico.

The representatives of Commonwealth Coatings Corporation, especially its Vice President and General Manager, Mr. Nieto, were regularly and frequently in the office of the Samford Companies in Puerto Rico, generally at least weekly, from the time these contracts were entered into in 1960 and 1961 through the abandonment of the work by the Petitioner in July 1962, and many times thereafter during the various conferences and negotiations held to settle the mutual disputes between the parties and commence the arbitration proceedings. Mr. Nieto and other representatives of Petitioner were on all of the projects involved, including those on which Mr. Capacete's firm rendered the services described in the record and briefs. The services rendered by Mr. Capacete's firm were in no way confidential or secret, but customary and routine services which involved performance of work on the project sites in regular day-light working hours. Subcontractors, suppliers, or others working on these projects could clearly see the activities of the representatives of Mr. Capacete's firm, just as they could observe the work and activities of other subcontractors and suppliers.

The Petitioner's Vice President, Mr. Nieto, knew of the Samford Virgin Islands operations. Petitioner's attorney, Mr. Robert Ruskin, also frequently had many discussions with various Samford representatives before and after the abandonment of the work by Petitioners in 1962. Mr. Ruskin, before the arbitration, represented a group that attempted to buy the Samford Virgin Island operations, and he made inquiry about and received information from the Samford representatives concerning the Samford Virgin Island

investments and operations. Mr. Ruskin, a Harvard Law graduate, professed to be knowledgeable of the construction industry and operations in Puerto Rico.

In 1962, a year or more before the arbitration, the concrete topping forming the floor in the laundry on the Puerto Rico Medical Center project separated at many points from the concrete slab. The owner's resident inspector who inspected the work of Samford and other prime contractors and subcontractors, including the painting work of Petitioner on this laundry project, condemned the floor and directed that it be removed and replaced. The laundry equipment had been installed and the laundry was nearing completion, with painting work being performed by Petitioner. The owner's resident inspector who condemned the work had a reputation among the prime and subcontractors working on the Puerto Rico Medical Center as being severely technical and unreasonably difficult to satisfy. When Respondent Samford contested his decision and claimed the floor failure resulted from design defects and demanded arbitration, this became a widely and commonly discussed construction dispute among the prime and subcontractors not only on the Puerto Rico Medical Center, but in the construction industry of the island. After arbitration was demanded and ready to proceed, the owner, the Puerto Rico Medical Center Board, through its Executive Director, upon learning that Respondent Samford had engaged Professor Capacete to testify regarding the cause of the floor difficulty, announced that it would not proceed with the arbitration, but be willing to accept the opinion and judgments of so eminent, honorable and recognized an engineer, expert and professor as Mr. Capacete. This

victory and development was also widely known and discussed by the construction industry in Puerto Rico and especially the prime and subcontractors on the Puerto Rico Medical Center and particularly by the Samford representatives with the Samford subcontractors on the laundry project. The Petitioner, Commonwealth Coatings Corporation, was such a subcontractor working on the project at the time, and A. C. Samford, Jr. and Roger Dickinson believe that Mr. Capacete's services and involvement on this project were known to Petitioner and its representatives. This might explain why the officers, managers and construction supervisors of Petitioner did not testify at the trial, especially why Mr. Nieto, the chief officer of Petitioner in Puerto Rico who was in constant contact with Respondent Samford, failed to testify or even appear at the trial.

The floor topping problem and dispute existed during the time while Petitioner was performing work on this very project, and representatives of Petitioner and Respondent Samford were in continual contact with one another during this period.

A. C. Samford, Jr. and Roger Dickinson did not themselves or with other representatives of Respondents or Respondent's attorney attempt to prevent Petitioner from learning of the terminated and past business relationships of Mr. Capacete's firm and Respondent Samford. They and many other representatives of Respondent Samford did not know what one or more of Petitioner's representatives may have independently known or inquired of one or more of the Samford representatives regarding Mr. Capacete's past business relationships. While they know of no inquiry

from Petitioner, they were fully and reasonably justified in believing Petitioner knew that Mr. Capacete and his firm had performed services in the past for Respondent Samford. They believed and assumed that Petitioner was as pleased and satisfied as each of them were that the other two arbitrators had selected and were successful in obtaining the services of such an eminent, honorable, knowledgeable, and recognized construction expert as Professor Capacete. They learned for the first time that Petitioner claimed to be ignorant of the past relationships when the Petitioner filed pleadings to set aside the arbitration award.

Petitioner's attorney, Mr. Romero, did not advise these or other representatives of Respondent Samford that Petitioner's attorney was a close and personal friend of Mr. Capacete, his neighbor and fellow club member, or that Petitioner's attorney had sought a private conference and the recommendation of Mr. Capacete regarding selection of a replacement arbitrator for this very arbitration. However, A. C. Samford, Jr. and Roger Dickinson believe that Mr. Capacete's character, capacity, integrity and ability did not allow any of these past relationships with Mr. Romero or Respondent Samford to in any way cause his judgment to be biased, partial or affected.

A. C. Samford, Jr. and Roger Dickinson believe Mr. Capacete felt no obligation — social, professional or otherwise—to Respondent Samford and that he had no expectation of future business from Respondent Samford whose ownership had completely changed, and whose Puerto Rico Vice President and General Manager serving during the period described the Petitioner's allegations had resigned, and Respondent Samford's

new representative, Roger Dickinson, had engaged competitors of Mr. Capacete for similar services.

A. C. Samford, Jr. and Roger Dickinson and other officers and representatives of Respondent Samford were not asked by Petitioner about the past services of Mr. Capacete and they had no knowledge that Petitioner did not know of them, but reasonably believed Petitioner had such knowledge, and further, they did not know to volunteer such information which it was assumed Petitioner knew.

Respondent Samford had performed many construction contracts where the owner's architect or engineer was given power to arbitrate or decide disputes regarding interpretations of the contract, liquidated damages and other contract requirements. Such decision-making power is common and customary to the construction industry. The owner's engineer or architect does not report to the contractor or subcontractors previous business, social or personal relationships existing between the architect or engineer and the owner. Mr. Capacete, as an eminent and widely recognized and sought engineer and architect, had no doubt performed such decision-making functions many times and decided disputes between business firms with which Mr. Capacete or his firm had done business. Undoubtedly, such experiences and the absence of complaint or objection about relationships, combined with the fact that Mr. Capacete's and his firm's work was openly done and the laundry floor services were especially well-known in the construction industry and to the contractors and subcontractors on the Puerto Rico Medical Center, all contributed to cause Mr. Capacete to innocently not volunteer to the Petitioner information the

Petitioner had not sought. This is made more reasonable, moral and understandable by the fact that Mr. Capacete knew that Petitioner's attorney, Mr. Romero, knew Mr. Capacete socially and as a friend and knew his professional activities and prominence in Puerto Rico and had talked with Mr. Capacete about this arbitration and had made inquiry as the Petitioner's attorney desired.

This case is the first arbitration proceeding (other than the routine architect-engineer disputes procedure under construction contracts) in which A. C. Samford, Jr., Roger Dickinson, and Respondent Samford have been involved except for one previous Virgin Island construction problem where the parties agreed to waive the three-man arbitration board requirement and jointly selected another Georgia contractor to decide their dispute in an informal fashion. Upon learning of Mr. Capacete's appointment, Respondent reported to its attorneys that the other arbitrators had selected a most excellent, honorable and competent engineer who was preeminently qualified to act as a fair and expert arbitrator.

Petitioner's representatives and attorneys at different times individually talked to different representatives and attorneys of Respondent Samford. There was no system or practical need to attempt to report the details of all such conversation, and there was no way for Respondent to know that Petitioner had not inquired and learned all it desired to know from Respondent's representatives or Mr. Capacete about the past and terminated relationships which involved services which were openly and publicly performed and well-known in the construction industry of Puerto Rico.

A. C. Samford, Jr. and Roger Dickinson swear that any failure, if there were such, to disclose to Petitioner the past relationships of Mr. Capacete was not calculated, but was totally innocent and moral and that Respondent Samford was consciously attempting to cause a lawful, fair and honorable arbitration to decide and forever settle the disputes between Petitioner and Respondent Samford.

/s/A. C. SAMFORD, JR.

/s/ROGER DICKINSON

JURAT

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

Commonwealth Coatings Corporation, *Petitioner* v. Continental Casualty Company, Fireman's Fund Insurance Company and A. C. Samford Overseas, Inc., *Respondents*	No. 14 Affidavit of OVERTON A. CURRIE, EDWARD H. WASSON, JR. and FEDERICO RAMIREZ ROS

Overton A. Currie, Edward H. Wasson, Jr. and Federico Ramirez Ros, after each was duly sworn by a Notary Public as shown below, made the following affidavit for use in the above case on the basis of their personal knowledge and information and belief which they verily believe to be true and correct.

Overton A. Currie (B.B.A., 1948, LL.B., 1949, U. of Miss.; LL.M., 1958, Yale, and Research Associate, Yale Law School Faculty, 1958-59) joined the law firm of Smith, Swift, Currie, McGhee & Hancock, Atlanta, Georgia, (now Smith, Currie & Hancock) in 1959. Edward H. Wasson, Jr. (B.A., 1959, Yale; LL.B., 1962, Harvard) joined the same firm in 1962. Before 1959, this firm served as labor counsel for Respondent Samford and thereafter also provided other legal services.

In 1959, Respondent Samford engaged the firm of the late Victor Gutierrez of San Juan, Puerto Rico as its Puerto Rican attorneys with this account being primarily served by Federico Ramirez Ros (B.A., 1949,

U. of Penn.; LL.B., 1952, U. of P. R.) now of the firm, Ramirez, Segal and Latimer, San Juan, Puerto Rico.

These attorneys and firms independently provided professional services on the various legal matters referred to them by Respondent Samford and sometimes jointly worked on the same matters.

These firms and Messrs. Currie and Ramirez had provided advice to Respondent Samford concerning the floor dispute in the Laundry on the Puerto Rico Medical Center project and knew of the services of Mr. Capacete in connection with this problem, all as described in the affidavit of A. C. Samford, Jr. and Roger Dickinson. They did not know Mr. Capacete had provided other services for Respondent Samford. They knew that Petitioner's representatives and attorneys had separately communicated with them and other representatives of Respondent Samford and did not know what inquiry or information Petitioner may have made or obtained of the other representatives and attorneys of Respondent Samford. For the reasons explained in the affidavit of A. C. Samford, Jr. and Roger Dickinson, it was reasonable for these attorneys to believe that Petitioner knew of Mr. Capacete's services in connection with the floor dispute concerning the Laundry of the Puerto Rico Medical Center project.

These attorneys did not know Petitioner claimed to have no knowledge of the previous services of Mr. Capacete and his firm to the Samford organizations until Petitioner made such allegations challenging the arbitration award.

From the inception of the dispute between Petitioner and Respondents, Petitioner was represented by able

New York and Puerto Rico counsel well-experienced in construction disputes and litigation.

This was the first arbitration case tried by Overton A. Currie and Edward H. Wasson, Jr., and the second arbitration case tried by Federico Ramirez Ros. These three attorneys primarily relied upon and proceeded upon the legal principles and customs that govern a trial in the federal courts, and did advise Respondent Samford not to allow their representatives to discuss or have private communications with the arbitrators regarding the dispute. They knew of Mr. Capacete's reputation as an excellent, honorable and competent engineer, which was recognized and ratified by the Board of the Puerto Rico Medical Center in resolving the laundry floor dispute described in the affidavit of A. C. Samford, Jr. and Roger Dickinson.

Overton A. Currie, Edward H. Wasson, Jr. and Federico Ramirez Ros swear that any failure, if there was such, to disclose to Petitioner the past relationships of Mr. Capacete was not calculated, but was totally innocent and moral and that Respondent Samford was consciously attempting to cause a lawful, fair and honorable arbitration to decide and forever settle the disputes between Petitioner and Respondent Samford.

/s/OVERTON A. CURRIE

/s/EDWARD H. WASSON, JR.

/s/FEDERICO RAMIREZ ROS

JURAT

CERTIFICATE OF COUNSEL

I, Overton A. Currie, counsel of record in the above-styled proceeding, hereby certify that this Petition for Rehearing is presented in good faith and not for purposes of delay.

/s/OVERTON A. CURRIE

Attorney for Respondents